Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

BOBBY J. ANDERSON,
Petitioner,

V.

DALLAS AREA RAPID TRANSIT,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth District

---

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED FOR REVIEW

Did the district court err in granting summary judgment to Dallas Area Rapid Transit in a Title VII discrimination case in finding that Bobbie J. Anderson had not presented a material fact issue regarding discriminatory pretext in his termination, that Dallas Area Rapid Transit reasonably believed Bobbie J. Anderson violated a work rule, and that Dallas Area Rapid Transit is Not a "Person" within the meaning of 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobbie J. Anderson prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, in this case.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Texas Dallas Division is set forth at pages 3a to 18a of the Appendix, (App. 8a-10a). The decision of the United States Court of Appeals for the Fifth Circuit is set forth at pages 1a to 2a of the Appendix, (App. 1a-2a).

STATEMENT OF JURISDICTION

This is a civil action seeking relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). The district court entered summary judgment for Dallas Area Rapid Transit ("DART") on September 30, 1998. That judgment was appealed to the Court of Appeals for the Fifth Circuit on October 30, 1998. On May 6, 1999, the Court of Appeals affirmed the district court's decision. Pursuant to 28 U.S.C. §1254, the Supreme Court has jurisdiction over final decisions of the Court of Appeals.

STATEMENT OF THE CASE

A. Facts

The facts are in dispute.

Bobbie Anderson ("Anderson") worked from May 1996 through April 3, 1997, as a transit police officer for DART. As a standard condition of employment, Anderson was placed on an initial six month probationary period. Anderson received field training with senior transit police officers. He received high marks throughout his training.

During the probationary period, Anderson was involved in an incident while on-duty. After investigation of the incident, Chief Juan Rodriguez initially decided to terminate Anderson. Chief Rodriguez was advised by his superior, Victor Burke not to terminate Anderson. After reconsidering the additional advice from his superior, Chief Rodriguez gave Anderson a five-day suspension.

On March 21, 1997, at approximately 1:45 a.m., while off-duty, Anderson and his passenger Irish Dodd were driving eastbound on Northwest Highway near Marsh Lane headed toward the only 24 hour Eckerd in the area on Mockingbird and Airline, when a dark colored Jeep operated by four Southern Methodist University students abruptly and dangerously pulled out of a side street adjacent to Anderson's vehicle. (Anderson Dep. p. 15 and Anderson Dep. pp. 294-5).

Anderson and several other vehicles had to swerve off the roadway to avoid collision, as the Jeep darted "across three lanes of traffic." (Anderson Dep. p. 296). The Jeep continued to swerve all over the road, forcing other cars on the road onto the curb on the right, onto the median in the center of the road, or into on-coming traffic lanes on the left. (Anderson Dep. p. 299 and Dodd Dep. pp. 19, 21).

Believing that the Jeep would stop driving recklessly if he identified himself as a peace officer, Anderson pulled up next to the passenger side of the vehicle while at the stop light, identified himself as a transit police officer and told them to "cut out the horseplay before someone was hurt." (Anderson Dep. pp. 301-2). The passenger gave Anderson the "middle finger" and the driver proceeded eastbound prior to the light turning green. The driver continued to drive in a reckless and dangerous manner. (Anderson Dep. pp. 302-3 and Dodd Dep. p. 18). Anderson asked his passenger Irish Dodd to copy down the license plate number and the SMU parking decal number on the Jeep. Anderson dropped back from one to two car lengths from the Jeep as a safety caution and proceeded to follow with caution. (Anderson Dep. p. 302-3). Anderson had no access to a phone in his vehicle to be able to contact the police. Anderson was on the constant look out for a police car so that he could alert them to the reckless driving of the Jeep. (Dodd Dep. pp. 23-4). In the interest of public safety, Anderson continued to follow the Jeep into the University Park and Southern Methodist University campus.

As Anderson approached the SMU campus, Anderson was sure that he would be able to locate a police officer to handle the matter. (Dodd Dep. p. 23 and Anderson Dep. p.311). The Jeep turned left onto Daniels from Hillcrest. He immediately turned off his headlights. (Anderson Dep. p. 322). The Jeep continued to travel without lights for a considerable distance. (Anderson Dep. pp. 324-32). Eventually, the Jeep turned down an alley.

Anderson followed the Jeep into an alley. As he came out of the alley, Anderson could not find the Jeep. Anderson saw a white police car and flashed his lights in an attempt to signal the officer for

assistance. The officer did not respond. (Anderson Dep. p. 332). Anderson got out of his vehicle to look for the police car. (Anderson Dep. p. 334) After exiting his vehicle, Anderson heard a noise behind him. He turned around and saw the Jeep. The Jeep drove straight at Anderson. Instinctively, Anderson drew his gun to protect himself from the Jeep coming at him. He felt that Jeep was being used as a weapon against him. (Anderson Dep. pp. 348-9).

Anderson never pointed the gun at the Jeep or any of the Jeep's occupants. Rather, he held it pointed to the ground and moved quickly, reflexively, in a "rolled out" stance to put his car in between him and the Jeep. (Anderson Dep. p. 348 and Dodd Dep. p. 43). The Jeep ran over the curb turning right, going over the grass, nearly hitting a stop sign. (Anderson Dep. p. 349-50 and Dodd Dep. p.44).

Anderson got back in the car and went in the direction of the SMU police Department to report these incidents. On his way, Anderson saw that the University Park police had seen the Jeep make a reckless right hand turn to avoid them and that they were in pursuit. (Anderson Dep. pp. 351-3). The driver of the Jeep continued driving recklessly until he was forced to pull over by the University Park police. Anderson followed the University Park police vehicle until they affected a stop.

When the police officer made the stop of the Jeep, Anderson parked his vehicle, exited and was prepared to give his statement to the police officers present. The University Park police told Anderson "to get on out of there, they would handle it." (Bateman Dep. pp. 80-1) They failed to interview Anderson's passenger, Irish Dodd. (Bateman Dep. p. 81 and Dodd Dep. pp. 46-7). The University Park Police issued no citations to any of the participants.

At 8:00 a.m., that same day, pursuant to DART regulations, Anderson reported the incident to his immediate supervisor. Sergeant Long initiated an investigation of the March 21, 1997 incident. Anderson was placed on administrative leave pending further investigation. (Bateman Dep. p. 53) During the investigation, Sergeant

Billy Bateman took statements from Anderson, Dodd and an SMU Lieutenant who was at the scene of the end of the chase.

On April 3, 1997, after a haphazard investigation, Chief Juan Rodriguez terminated Anderson for the incident occurring in the early morning hours of March 21, 1997. The stated reasons for the termination included: (1) engaging in a pursuit of a vehicle out of jurisdiction of the Transit Police while off-duty; (2) pursuing a vehicle at unsafe speeds of up to 65 mph; (3) by unnecessarily endangering yourself, your passenger, and the four occupants of the vehicle you pursued; (4) by drawing your service weapon from your person towards the vehicle; and (5) acting without the approval or consent of the DART Transit Police Department and in violation of DART Transit Police Department Code of Conduct. (Exhibit "C"). On May 20, 1998, Chief Rodriguez denied Anderson's protest under DART's internal grievance procedure.

Anderson protested his termination through DART's dispute resolution process which consists of three steps. Step one requires the aggrieved employee to present his complaint to his immediate supervisor. Step two allows the employee to submit his complaint to the Chief if it was not satisfactorily resolved at step one of the process. Step three allows the employee to appeal his complaint if it was not satisfactorily resolved in step two to the Management Appeals Committee. The Committee submits its recommendation to DART's President/Executive Director who reviews the Committee's decision and either accepts it or makes an independent finding.

At step three in the process, Anderson presented his case before the Committee, which found Anderson should not be reinstated. Finally, DART's President/Executive Director, Roger Snoble, reviewed the Committee's written recommendation and the documents presented to the Committee, and also denied Anderson's request for reinstatement.

B. Proceedings Below

This Case involves a claim of discrimination under Title VII of

the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). On July 28, 1997, Bobbie Anderson, as plaintiff, filed a civil action claiming that DART, defendant, had terminated him based on his race which violated Title VII. On July 22, 1998, DART filed a motion for summary judgment and brief in support thereof. The district court granted DART's motion for summary judgment, filing the Court's Memorandum Opinion and Order on September 29, 1998. Final Judgment dismissing Anderson's complaint with prejudice was entered on October 30, 1998.

Anderson filed a Notice of Appeal to the Court of Appeals for the Fifth Circuit on October 30, 1998. After reviewing the record and the briefs, the Court of Appeals affirmed the district court's decision on May 6, 1999. Bobbie Anderson appeals from this judgment.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari because the Court of Appeal's decision raises an important question of federal law that this Court should resolve.

I. THE DISTRICT COURT ERRED IN FINDING THAT BOBBIE J. ANDERSON HAD NOT PRESENTED A MATERIAL FACT ISSUE REGARDING DISCRIMINATORY PRETEXT IN HIS TERMINATION.

A. A Motion For Summary Judgment Should Be Viewed Most Favorable Towards the Nonmoving Party.

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Bender v. Brumley,* 1 F.3d 271 (5th Cir. 1993). If there are genuine disputes as to material facts, summary judgment should not be granted.

When deciding a motion for summary judgment, the court may not evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes as long as "the evidence in the record is such that a reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor, the court must deny the motion." *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991).

The review of the facts must draw all inferences most favorable to the party opposing the motion. *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). The Court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. Any assessments of credibility and all choices between available inferences are matters to be left for a jury, not matters to be decided by the Court on summary judgment. *Celotex Corp., supra,* at 323.

The district judge erred when it failed to resolve all ambiguities and draw reasonable inferences in favor of Anderson, the nonmoving party. The district court relied upon DART's version of the facts rather than Anderson's, the nonmoving party. The district court erred in finding that these facts are not material as they go to the theory of DART's termination of Anderson.

First, DART characterizes Anderson's actions in following the car as a "high speed chase" with absolutely no factual foundation. DART relied upon Sergeant Long's report that Irish Dodd said that the Jeep was traveling approximately 65 mph. Ms. Dodd testified about the circumstances of that statement and that the statement did not accurately reflect her recollection of the events as they occurred that night. (Dodd Dep. pp. 7-8, 71-72). DART also relied on a memorandum by Sergeant Bateman pertaining to his observations of the traffic flow. There is no showing of any expertise or specialized knowledge which would qualify Sergeant Bateman to reach any conclusion as to the traffic pattern and traffic flows on March 21, 1997. Those statements do not constitute competent summary judgment evidence and should not be considered by this Court. Anderson asserts

that he was following the Jeep at a safe distance, at a safe rate of speed. Statements taken from Anderson and Dodd indicated that Anderson "followed" the Jeep in an effort to locate a police officer and report the erratic driving witnessed by Anderson and Dodd. (Exhibit "D," "F", and "G").

Second, DART misleadingly states that Anderson saw a police car in the vicinity and decided not to advise this unit of the traffic violation. Anderson stated that the police car was engaged in its own traffic enforcement action and that, as a police officer, he knew that it would be inappropriate for him to interfere with that traffic stop. (Anderson Dep. 319-320)

Third, DART asserts that Anderson "pulled his gun and pointed it at the driver," a fact which Anderson has repeatedly denied. DART relies on two memoranda authored by Sergeant Bateman. The memoranda are hearsay and do not constitute competent summary judgment evidence and should not be considered by the Court. (Def. App. Exs. 153, 154). Anderson states that he pulled his weapon but did not have time to do anything else because the vehicle was so close to him. (Anderson Dep. p. 348).

If the court had viewed this information in the light most favorable to Anderson, the nonmoving party, the court would have found that Anderson provided sufficient material facts that the evidence is such that a reasonable jury would draw all inferences in favor of the nonmoving party and could arrive at a verdict in that party's favor. The court should have denied the motion. This Court should reverse the lower court's decision and remand for a jury trial.

B. The Plaintiff in a Title VII Trial Must Abide by the *McDonnell Douglas* Burden Shifting Framework.

Under the *McDonnell Douglas* burden-shifting framework, once the plaintiff has established a prima facie case, the defendant must provide a legitimate, non-discriminatory reason for the adverse employment action. The burden of persuasion then shifts back to the

plaintiff who must show that the defendant's reason is merely pretext to disguise discriminatory intent. *McDonnell Douglas v. Green,* 411 U.S. 792 (1973).

The first two prongs of the framework are not at issue. The third prong relating to discriminatory pretext is essential to the matter at hand. To establish an inference of discrimination from circumstantial evidence, the trier of fact must look at all available evidence and determine if an inference may be made. *Watson v. Ft. Worth Bank & Trust,* 487 U.S. 977, 983, 108 S.Ct. 2777, 2783 (1988).

To meet its burden, DART claims that violation of DART's authority both with respect to subject matter jurisdiction and jurisdictional property boundaries was the reason for Anderson's termination. Anderson must prove that this is a pretextual reason for the termination and the true reason for their employment decision was his race. He can succeed by showing directly or indirectly that the discriminatory reason most likely motivated DART or that their reasons are unworthy of credence. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).

This court must determine whether or not the employee has met the requirements to prove that the employer's reason for his termination was pretext for discriminatory motives.

1. **To demonstrate intentional discrimination a plaintiff may use one of two methods. First, the plaintiff may show through direct evidence that they were discriminated against. The other option is to establish an inference of discrimination and pretext.**

A plaintiff may allege that there is direct evidence that the employer discriminated against the employee. In Anderson's case, there is only circumstantial evidence from which an inference of discrimination may be reached, so this first option is unavailable to the appellant.

An alternative method by which an inference of intentional

discrimination can be raised was established by the Supreme Court in *McDonnell Douglas.* 411 U.S. at 800-01. The plaintiff must demonstrate the existence of a material fact as to whether's defendant's explanation is a pretext for discrimination. Pretext can be shown by the employee was treated differently than similarly situated co-workers.

This is demonstrated by a review of the discipline imposed upon other DART Transit Officers who were not terminated although their conduct was more egregious. These officers were Hispanic versus the African-American officers who were terminated.

The first officer not terminated was also involved in an off-duty incident similar to Anderson. Officer Thomas Montoya was arrested in an off-duty bar fight in which he was removed by bouncers from the Iguana Mirage night club on August 25, 1996 at approximately 2:20 a.m. Montoya was restrained, arrested, handcuffed and charged with Class C misdemeanor assault by two Dallas Police officers. Like Anderson, Officer Montoya's off-duty behavior occurred at approximately 2:00 in the morning. Unlike Anderson, Montoya failed to report his incident to DART authorities the next morning consistent with departmental rules. It was a formal report from the Dallas Police Department officers filed the next afternoon with the DART duty Sergeant that even alerted DART to the incident.

Montoya's behavior resulted in a formal letter of apology from Rodriguez to Chief Ben Click of the Dallas Police Department dated September 23, 1996. For this infraction of "conduct unbecoming a peace officer", Officer Montoya received only a five day suspension with out pay and was removed from motorcycle duty. (Rodriguez Dep. Vol. 1, p. 298)

Montoya was more at risk of harming the public than Anderson in that he was involved in a fight were people could have been hurt. Montoya was also arrested for his actions and the altercation happened within a night club which would not be within the jurisdiction of DART. If being outside of DART's jurisdiction is a basis for termination, then Montoya should have been terminated. However, he was not. This

shows preferential treatment by DART towards Hispanic officers.

The second Hispanic officer was on-duty at the times of his complaints. However, his behavior caused great harm to the public yet he was never terminated for his actions. Between January 29, 1997 and February 21, 1997, just before the termination incident of Officer Anderson, Julio Sanchez was the subject of at least five (5) formal citizen complaints made in a 30 day period. (Rivera Dep. pp. 38-9 and Sanchez Dep. pp. 29-33). During the investigation of these formal complaints, not only was Sanchez not placed on administrative leave, he was allowed to continue his menacing practices on the very public DART purports to protect. While the investigation of an incident where Sanchez sprayed a seated, hand-cuffed suspect was being conducted, Sanchez was allowed to keep his DART issued pepper mace and then sprayed another citizen in violation of DART policy within a few weeks of the first incident. (Sanchez Dep. pp. 29-45 and Rivera Dep. pp. 38-44).

On January 29, 1997, the first complaint was initiated by a DART customer, who Sanchez removed from the train for allegedly failing to have the proper fare. "The complainant alleged that Sanchez 'tripped him', used inappropriate language, and threatened to mace him, without cause." (See Exhibit "H"). According to Deposition testimony taken from both Sanchez and Rivera, this particular incident was not investigated until other similar complaints had been lodged against Sanchez. (Sanchez Dep. p. 32)

The second complaint was one of unnecessary force as well. On February 4, 1997, Sanchez responded to a call for cover from Officer M. Hawkins at the Light Rail Transit Center at Union Station. Upon his arrival, the suspect had been handcuffed by Hawkins and was "seated on one of the seats provided for the patrons." (See Exhibit "I"). According to Sanchez, the suspect was making derogatory comments, clearing his throat and spitting at him. (Sanchez Dep.36) Sanchez testified that he "did grab a can of mace, and squirted his face." He then added, "[t]hat squelched the whole thing. He didn't say a word anymore about anything other than said (sic) Man, please, clean my

eyes. I'm burning. My eyes are burning and my face. Clean me up." (Sanchez Dep. p. 36).

Citizen bystanders witnessed the actions of Sanchez and reported the use of unnecessary force as they had witnessed to DART. It was the bystander citizens who made the formal complaint of unnecessary force to DART. (Sanchez Dep. pp.36-7). When the bystanders asked Sanchez what he was doing, he threatened to mace them as well. (Sanchez Dep. p. 37, Rivera Dep. pp. 47-48, and Exhibit "I", Interoffice Memorandum dated March 13, 1997, Subject: Level II Appeal.) Chief Rodriguez conducted an investigation, made a finding that unnecessary force had been exacted upon the suspect and suspended Sanchez for five days.

The third complaint also involves pepper spray. According to the DART Police report, Sanchez sprayed the complainant's face and mouth with pepper mace. (Exhibit "I"). On February 17, 1997, Sanchez claims he was checking for DART fares on the rail. As he approached a white female, he noticed that her transfer has expired. He told her politely that her ticket had expired and instructed her that she would have to get off at the next stop and purchase a ticket. (Sanchez Dep. p. 67). According to Sanchez's deposition testimony, a black male passenger on the train, stood up as he was talking to the white passenger and stated, "What the hell are you talking about my ticket is expired?" and then pulled the emergency button for the train operator to respond. (Sanchez Dep. P. 68). Sanchez claims he then told the black male passenger that he would have to get off the train at the next station. For unknown reasons, Sanchez "pulled [his] mace spray and told the [suspect] [he] would spray him if he did not comply." As the black male passenger was exiting the train, Sanchez sprayed him with pepper mace and the passenger sprayed him back.

The black male passenger did not file a complaint with DART concerning these events. The white passenger filed the complaint. She had been allowed to keep her seat although she had an expired transfer. She felt that the black male passenger had not been treated as fairly as she had. (Sanchez Dep. p. 70). Complaints four and five were made

anonymously by telephone on February 21, 1997. Both calls were received by DART headquarters and complained that Sanchez had used "unnecessary force on a customer while assigned to the light rail." (Exhibit "I").

Sanchez received two internal complaints from two fellow officers, both female. One officer (a subordinate) alleged that during training, Sanchez treated her harshly. Yet another female officer lodged a sexual harassment allegation against Sanchez. She filed it internally with DART and then sought help outside DART at the EEOC. The lawsuit is pending. (Sanchez Dep. p. 31, Rivera Dep. pp. 73-4 and Rodriguez Dep. pp. 45-6.)

For the foregoing complaints, Rodriguez convened a "never-before empaneled committee," rather than terminate Sanchez as he did Anderson. (Rodriguez Dep. Vol. 1, pp. 209-10). Rodriguez had the authority to terminate Sanchez as he did Anderson. Rodriguez failed to appear at the committee's second meeting and they voted a ten day suspension for Sanchez with a demotion from the rank of corporal to officer II for all of the infractions. (Rodriguez Dep. p. 241) By convening the special committee and using the recommendation, Rodriguez would use this as the reason why he did not terminate Sanchez rather than real reason, favoritism.

Despite Rodriguez's implications that this was a mechanism to terminate Sanchez, this gave the Hispanic officer additional due process that was not given to Anderson. Although Officer Sanchez was subsequently fired for medical reasons, he was ultimately rehired and recently promoted. This is a clear case of preferential treatment towards Hispanic employees over African-American employees.

Because of the difference in treatment in disciplinary actions of Hispanics and African-Americans, this evidence shows a pretext of discriminatory motives by DART. The district court overlooked this material evidence and erred in its finding that Anderson produced no material fact to support his claim of discrimination.

2. A review of the facts present a racial bias which stems from Chief Rodriguez and s tacitly and actively condoned at all levels of supervision at DART.

Chief Rodriguez testified that, to his knowledge, neither Victor Burke or Roger Snoble had ever called into question the "fairness or consistency or efficiency" with which he was supervising investigations or imposing discipline. (Rodriguez Dep. Vol. 1, p.87). This inference is further supported by Rodriguez's actions with respect to the administrative investigations of Anderson.

It is undisputed that Rodriguez had decided to terminate Anderson for the incident involving the stolen vehicle. Also, it is undisputed that Victor Burke, Rodriguez's immediate supervisor, called Rodriguez and met with him at least twice to discuss Anderson's situation with respect to this incident. Burke, after being fully briefed by Rodriguez, concluded that DART "had a new transit officer that just made a mistake that went outside of the normal transit officer's investigative role and rules are here at DART, but his opinion was not that it was of the magnitude for the maximum punishment." (Burke Dep. pp. 61-6).

Burke determines that it is an infraction but not of sufficient magnitude for maximum punishment; Rodriguez determines that Anderson should be terminated. That comparison provides a basis for an evidentiary inference that Rodriguez was imposing a harsher discipline because of Anderson's race.

Additionally, at the time that Anderson was fired, not one Hispanic officer, even ones with records inferior to his, had ever been terminate. (Rodriguez Dep. Vol. I, pp. 37-8, 46, 74, and 286). By way of contrast, several of the African American officers who were fired by Rodriguez or forced to resign by Rodriguez have been terminated during the probationary period, a period during which they have no due process rights. (Rivera Dep. p. 67-8).

Thus, Rodriguez's disciplinary practices, as ratified by DART's actions and inactions give rise to the inference of racial discrimination as well as creating a disparate impact on blacks. This Court should reverse the district court's decision and remand back for a new trial by jury.

II. THE DISTRICT COURT ERRED IN FINDING THAT DALLAS AREA RAPID TRANSIT REASONABLY BELIEVED BOBBIE J. ANDERSON VIOLATED A WORK RULE.

DART asserts that it was justified in terminating Anderson based upon its investigations of the March 21, 1997 incident and the conclusions it drew in regards to Anderson's conduct on that occasion. However, after reviewing the record fairly and objectively, it is clear that DART's articulated reason for its actions in terminating Anderson were not legitimate but a pretext for discrimination.

DART declares that Anderson's actions "were outside DART's jurisdiction." Yet, the statutory authority says otherwise:

> *An authority may employ and commission its own peace officers with power to make arrests in all counties where the system is located when necessary to prevent or abate the commission of an offense against the laws of the state or a political subdivisions of the state when the offense or threatened offense occurs on or involves the system of the authority, to make arrests in cases of an offense involving injury or detriment to the system, to enforce all traffic laws and to investigate traffic accidents which involve or occur in the system, and to provide emergency and public safety services to the system or persons who use the system.* Tex. Rev. Civ. Stat.Ann.Art. 1118x.

Case law defines the "system" as the "area within the boundaries wherein service is provided or is supported by a general sales and use

tax." See e.g. *Held v. State of Texas,* 948 S.W.2d 45 (Tex.App.--Houston [14th Dist.] 1997); *State v. Norton,* 899 S.W.2d 303, 304 (Tex.App.--Houston [14th Dist.] 1995, no pet.); *State v. Elliott,* 879 S.W.2d 381, 384 (Tex.App.--Waco 1994, pet. Ref'd).

Additionally, pursuant to the Texas Code of Criminal Procedure Annotated, Article 2.13:

> *It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime.*

When this article is read in conjunction with the language of the DART Transit Police Procedures Manual and the case law definition of transit "system" as the taxing authority and/or geographical area served by the authority, Anderson's actions were appropriate. He is a peace-officer "vested with all rights, privileges, obligations and duties of peace officers in the State of Texas. This is confirmed by the language contained on Anderson's peace officer's identification; oath of office and licenses. (Exhibit K).

DART's insistence that Anderson's actions on March 21, 1997 exceeded his authority is pretext for its discriminatory motives. The record establishes that DART does recognize the importance of DART Transit Police taking actions to "protect life and property" and requires its officers to be prepared to act, on and off-duty, while in a member city. Because DART buses travel through and make stops in the University Park area, this makes University Park a member city. On March 21, 1997, Anderson was preparing to act while in a member city. This makes Anderson within DART's jurisdiction.

In advancing its justification, DART argues that Anderson was trained "regarding the jurisdictional limits placed on the DART police force." However, the record does not support that conclusion. As part of the Field Training process, Anderson maintained a log of his training

to be confirmed by the Field Training Officer. As reflected by Anderson's log, he did not receive the instruction relative to jurisdiction. (Exhibit K). Also, the Training Manual received by Anderson is absolutely devoid of any mention of jurisdiction or any instruction that transit officers were not to take action to stop illegal, dangerous conduct. DART argues that a Procedures Manual provided that information. The inventory of equipment issued to Anderson reflects that he did not receive a Procedures Manual. (Exhibit K). Chief Rodriguez admits that he has a vague idea regarding the training that probationary officers receive from the field training officers. (Rodriguez Dep. Vol. II, pp. 112-115).

DART repeatedly asserts that Anderson's actions endangered the public. However, DART has no evidence to support this claim. DART had no proof of a high speed chase. The only proof DART had was that Anderson was following the Jeep to prevent it from causing harm to the public.

Pursuant to *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), the employee can show pretext by proving the employer's reason is unworthy of credence. Anderson has proved that DART's reason for terminating him is unworthy of credence because it is false. The district court erred in finding that DART reasonably believe Anderson violated a work rule.

III. THE DISTRICT COURT ERRED IN FINDING THAT DALLAS AREA RAPID TRANSIT IS NOT A "PERSON" WITHIN THE MEANING OF 42 U.S.C. § 1983.

DART was not entitled to summary judgment pursuant to 42 U.S.C. § 1983 or the Eleventh Amendment. The court should have used the analysis set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). To determine whether DART is a "person" for purposes of § 1983, the court must determine whether DART, a political entity, is an arm of the state entitled to Eleventh Amendment protections or a municipality and therefore, a "person" as contemplated

under § 1983.

The Fifth Circuit has articulated a specific list of factors to be reviewed in determining when an entity enjoys Eleventh Amendment immunity. *Clark v. Tarrant County,* 798 F.2d 736, 744-45 (5th Cir. 1986). These factors include (1) whether state law views the entity as an arm of the state; (2) the source of the entity's funding; (3) the degree of local autonomy retained; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity retains the right to hold and use property.

Using the above standard, it is clear that DART is not an arm of State and is not entitled to Eleventh Amendment immunity and it is subject to suit under § 1983.

Under the Texas Transportation Code, a regional transportation authority may be created to provide transportation services to a defined territory. While state statute defines the mechanism by which the authority is created, a specific regional transportation authority such as DART is not created by the Texas legislature. A regional transportation authority can only come into existence after the preparation of a petition of at least five percent (5%) of the registered voters requesting the creation of such an authority (Tex. Transp. Code §452.701); the adoption of a resolution describing the proposed territory (Tex. Transp. Code §452.703); the conduct of public hearings (Tex. Transp. Code §452.706); and a successful "confirmation election" is conducted (Tex. Transp. Code §452.715). If the authority is not confirmed by election by its third anniversary, that authority expires. (Tex. Transp. Code §452.720).

These statutory requirements establish that DART is a separate political entity. This is reaffirmed by Tex. Transp. Code §452.052 that states that an authority is a public political entity and corporate body. Under Texas law, DART is viewed as an authority which is considered a political entity. According to the U.S. Supreme Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 99 S.Ct.

1171, 1177 (1979), political subdivisions of the State have been consistently refused protection under the Eleventh Amendment even though such entities exercise a "slice of state power."

In consideration of the other factors set forth in *Clark v. Tarrant County,* that once the regional transit authority, DART in this case, is established, it is operated by an executive committee responsible for the "management, operation, and control of an authority and its property." (Tex. Transp. Code §452.053) The authority "may sue and be sued." (Tex. Transp. Code §452.054) It may generate funds by "reasonable and nondiscriminatory fares, tolls, charges, rents, ... tax revenues and grants." (Tex. Transp. Code § 452.061).

In consideration of the above, the Court should have found that DART is a political subdivision of the State of Texas as it is a regional authority and considered a local government unit. According to the Supreme Court in *Monell,* 436 U.S. at 690, local government units are included among those "persons" to whom the Civil Rights Act of 1871 applies.

Further, DART is analogous to other entities found to be local political subdivisions of the state by the Fifth Circuit and therefore subject to suit as "persons" acting under color of law. In *Hickman v. U.G. Lively and Metropolitan Transit Authority,* 897 F.Supp. 955 (S.D. Tex. 1995), the Court rules that Metropolitan qualified "as a local government entity by virtue of Tex. Rev. Civ. State. Art. 1118 §13A." The Court further engaged in a discussion of potential liability under §1983 without any hesitation or discussion of the applicability of §1983. Similarly, in *Houston Contractors Association v. Metropolitan Transit Authority of Harris County,* 984 F. Supp. 1027 (S.D. Tex. 1997), the Court found that racially preferential contracting procedures used by MTA (the Houston equivalent to DART) violated equal protection. Again, the Court did not engage in any discussion regarding the Eleventh Amendment or §1983.

DART is clearly a municipality under the above-stated standards and is therefore, a "person" for purposes of §1983 liability. The district

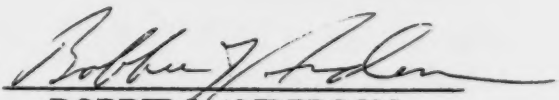
court erred in finding that DART was not a "person" for purposes of §1983 liability.

CONCLUSION

After reviewing the record in conjunction with the above argument, it is clear that the district court erred in granting summary judgment for Dallas Area Rapid Transit. First, Anderson did present material facts regarding discriminatory pretext in his termination; second, DART did not reasonably believe that Anderson violated a work rule; and third, DART is a "person" within the meaning of 42 U.S.C. § 1983 and should not be allowed immunity under the Eleventh Amendment.

For the foregoing reasons, Bobbie J. Anderson respectfully prays that the United States Supreme Court reverse the decisions of the Court of Appeals for the Fifth Circuit and the District Court for the Northern District of Texas and order the court to proceed to a jury trial in this matter.

Respectfully submitted,

By: 

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APPENDIX A

[Filed May 6, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11302
Summary Calendar

BOBBIE J. ANDERSON,
Plaintiff-Appellant,

V.

DALLAS AREA RAPID TRANSIT,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CV-1834-R

Before POLITZ, BARKSDALE, and STEWART, Circuit Judges.
PER CURIAM:[1]

Bobbie Anderson, *pro se,* appeals the summary judgment in favor of Dallas Area Rapid Transit (DART).

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should bot be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Anderson, a former transit officer for DART was terminated following an incident whereby Anderson, while off-duty, followed a Jeep, and, *inter alia,* exchanged words with the occupants and drew his DART-issued firearm. Following his termination, Anderson protested through DART's dispute resolution process, which included review by a management Appeals Committee. Anderson's request for reinstatement was ultimately denied.

Anderson then filed this action against DART, claiming racial discrimination and retaliation, in violation of Title VII, 42 U.S.C. § 2000e et seq., and constitutional violations under 42 U.S.C. §§ 1981, 1983, 1985, together with Texas common law claims. The parties consented for the case to be transferred to a magistrate judge. Subsequently, DART's summary judgment motion was granted.

Anderson asserts essentially that the district court erred in finding that he had not presented a material fact issue regarding discriminatory pretext in his termination; that DART reasonably believed Anderson violated a work rule; and that DART is not a "person" within the meaning of § 1983. Having reviewed the record and the briefs, and pursuant to Fed. R. Civ. P. 56, we affirm for essentially the reasons stated by the district court in its comprehensive and well-reasoned opinion. See ***Anderson v. Dallas Area Rapid Transit,*** CA3:97-CV-1834-BC (N.D. Tex. Sept. 29, 1998).[2]

AFFIRMED

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[2] DART advises it intends to seek fees and expenses on the basis that this appeal is frivolous. Such relief is **DENIED.**

APPENDIX B

[Filed Sept. 29, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3:97-CV-1834-BC

BOBBIE J. ANDERSON,
Plaintiff,

V.

DALLAS AREA RAPID TRANSIT,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Dallas Area Rapid Transit's Motion for Summary judgment, filed July 22, 1998. At issue in this employment discrimination and civil rights action is whether Defendant Dallas Area Rapid Transit ("DART") unlawfully terminated Plaintiff in retaliation for engaging in activity protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq, ("Title VII") or discriminated against him on the basis of his race. Finding, as a matter of law, that DART's termination was not in violation of Anderson's statutory or constitutional rights, the Court GRANTS DART's motion as follows:

I. Background

This is a suit brought by Plaintiff, Bobbie Anderson ("Anderson") against his former employer, DART, alleging racial

discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., constitutional violations under 42 U.S.C. §§ 1981, 1983, 1985, and claims under Texas common law. This case centers on Anderson's termination on April 3, 1997. Anderson, an African-American, who worked as a transit police officer for DART, claims that the termination was based on his race and in retaliation for his prior complaint to DART's Chief of Police Juan Rodriguez ("Rodriguez"), that black DART employees were disciplined more harshly than Hispanic DART employees. What follows are the pertinent facts surrounding the termination.[1]

Anderson worked from May 1996 through April 3, 1997, as a transit police officer for DART. As a standard condition of employment, Anderson was placed on an initial six month probationary period. Anderson failed to satisfactorily complete this probation period, and was terminated in September of 1996. However, the termination was converted into a five day suspension and an extension of the initial probation period from its original termination date of November 1996 to February 1997.

The incident on which Anderson's lawsuit is based occurred on March 21, 1997. Anderson was off-duty. Anderson and the occupants of a Jeep exchanged words and Anderson followed or chased the Jeep for approximately six miles through Dallas and University Park.[2] At one point during the six-mile drive, Anderson exited his car and drew his

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[1] These uncontested background facts are taken from the Defendant's Mot. For Summ. J., filed on July 22, 1998, and the Pl.'s Resp. To Def's Mot. For Summ. J., filed on July 22, 1998. Unless characterized as a contention, all back ground facts are undisputed.

[2] The exact characterization of the incident involving Anderson and the occupants of the Jeep is highly disputed. Anderson contends he "followed" the Jeep, and did not speed at any time. Pl.'s Resp. To Def's Mot. For Summ. J. Conversely, DART contends Anderson was engaged in a "high-speed chase". Def's Mot. For Summ. J. Although this characterization is highly contested and throughly briefed, it is immaterial to this court's decision.

DART issued firearm.[3] Anderson the continued to follow the Jeep until it was pulled over by a University Park police officer. Anderson filed a report on the incident and was placed on administrative leave pending an investigation.

Anderson was terminated based on his involvement in the March 21, 1997 incident. He protested his termination through DART's dispute resolution process.[4] At step three in the process, Anderson presented his case before the Committee, which found Anderson should not be reinstated. Finally, DART's President/Executive Director, Roger Snoble ("Snoble"), reviewed the Committee's written recommendation and the documents presented to the Committee, and also denied Anderson's request for reinstatement.

Defendant DART has moved for summary judgment contending for several reasons that judgment must be entered in its favor in this case. First, with respect to Anderson's claim of racial discrimination under Title VII, DART argues that Anderson has failed to show that DART's proffered reasons for Anderson's termination were a pretext for discrimination and that race discrimination was the real reason. Second, with respect to Anderson's constitutional claims, DART argues that it is not a person within the meaning of 42 U.S.C. §§ 1983 and 1985, and therefore it cannot be sued under either provision. Alternately, should the court find DART is a person within the meaning of the statutes, DART argues that the Eleventh Amendment to the

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[3] Another contested issue is whether, as Plaintiff contends, he simply drew his weapon and moved behind his car, or as Defendant contends, Anderson drew his weapon and pointed it at the Jeep's occupants. Def.'s Mot. For Summ. J.; Pl.'s Resp. To Def's Mot. For Summ. J.

[4] DART's dispute resolution process for employee grievances consist of three steps. Step one requires the aggrieved employee to present his complaint to his immediate supervisor. Step two allows the employee to submit his complaint to the Manager of Employee Relations if it was not satisfactorily resolved at step one of the process. Finally, step three allows the employee to appeal his complaint if it was not satisfactorily resolved in step two to the Management Appeals Committee (the "Committee"). The Committee submits its recommendation to DART's President/Executive Director who reviews the Committee's decision and either accepts it or makes an independent finding.

Constitution prohibits Anderson from proceeding against DART under either § 1983 or § 1985. As for Anderson's § 1981 claim, DART argues it is entitled to summary judgment because the claim is improperly asserted, in that, § 1983 supersedes claims under § 1981 since DART is a "state actor." Finally, with respect to Anderson's retaliation claim under Title VII and his Texas common law claims, DART argues that its undisputed summary judgment evidence establishes a prima facie showing in its favor, and thus, based on Anderson's failure to respond to these claims, that DART is entitled to judgment as a matter of law.

Anderson opposes the motion for summary judgment arguing that genuine issues of material fact exist with respect to his disparate treatment claim under Title VII and his claims under 42 U.S.C. §§ 1983 and 1981.[5]

II. Standard of Review

Under Rule 56 © of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Only disputes about those facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the movant for summary judgment need not support the motion with evidence negating the opponent's case; rather,

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[5] In its Motion for Summary Judgment, DART asserts several grounds for summary judgment that Anderson fails to address in his Response to Defendant's Motion For Summary Judgment. Specifically, Anderson fails to respond to DART's summary judgment claims on retaliation under Title VII, conspiracy under 42 U.S.C. § 1985, and defamation and exemplary damages under Texas common law.

the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id.; Little,* 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little,* 37 F.3d at 1075 (*citing Celotex Corp. V. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' ... by 'conclusory allegations.' ... by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id. (quoting Matsushita Elec.Indus. Co. V. Zeniţh Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871-73, 110 S. Ct. 3177, 3180 (1990); *Hopper v. Frank,* 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.,* 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita,* 475 U.S. at 587, 106 S. Ct. at 1356 (*quoting* Fed. R. Civ. P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (*per curiam*); *Gremillion v. Gulf coast Catering Co.,* 904 F.2d 290, 292 (5th Cir. 1990) (*citing Bodnar v. Synpol, Inc.,* 843 F.2d 190, 192 (5th Cir.), *cert. denied,* 488 U.S. 908, 109 S. Ct. 260 (1988).

III. Analysis

A. Title VII Discrimination

Anderson argue that the motivation behind his termination was his race. He asserts that, although he was terminated for violating a DART work rule, some Hispanic DART employees who violated work rules were not terminated.

Title VII makes it illegal for an employer to discriminate in the terms, conditions or privileges of employment because of race. 42 U.S.C. § 2000e et seq. As a threshold matter, a plaintiff alleging

discriminatory discharge must show that: (1) he was a member of the protected class; (2) he was qualified for the job that he formerly held; (3) he was discharged; and (4) employees outside the protected class were more favorably treated. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973)(Title VII). Plaintiff must essentially show that he was treated differently than similarly situated individuals and that a causal connection exists between his race and the adverse employment decision. *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 575-77 (1978).

In employment discrimination cases, the Supreme Court has formulated an evidentiary procedure of shifting burdens. *See Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955, 957 (5th Cir. 1993) (*citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973)). First the plaintiff is required to make a prima facie case by demonstrating the elements required for the particular type of discrimination he is alleging. Upon meeting this requirement, a presumption of discrimination arises which the defendant must then rebut by setting forth a legitimate, nondiscriminatory reason for the challenged action. *Id. (Citing Olitsky v. Spencer Gifts, Inc.,* 964 F.2d 1471, 1478 n.19 (5th Cir. 1992), *cert. Denied,* 507 U.S. 909, 113 S. Ct. 1253 (1993)). Once the employer has met this burden of production, the employee's prima facie case dissolves and the plaintiff must prove that the employer's proffered reason is a pretext for the type of discrimination alleged. *Bodenheimer,* 5 F.3d at 957.

Once the employer has met its burden of production, the plaintiff's burden of persuasion arises, and he must prove that the proffered reasons are not just pretextual but pretexts for discrimination of the type alleged by the employee. *Bodenheimer,* 5 F.3d at 957. It is not enough for the employee to merely show that the defendant's reasons were not credible; rather, to ultimately prevail, the plaintiff must prove by a "preponderance of the evidence that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was." *Id. (*emphasis added) (*citing St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 125 L.Ed.2d 407, 113 S. Ct. 2742 (1993)).

In work rule violation cases, as here, a Title VII plaintiff may establish a prima facie case by showing "'either that he did not violate the rule or that, if he did, [Hispanic] employees who engaged in similar acts were not punished similarly.'" *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995). (quoting *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 879, 101 S. Ct. 227, 55 L.Ed.2d 102 (1980)).

Anderson attempts to establish a prima facie case via both routes, claiming he did not exceed DART's jurisdictional mandates, and that, even assuming he had, that DART engaged in disparate treatment because similarly situated Hispanic employees have not been as severely disciplined. Each of these bases upon which Anderson attempts to establish his prima facie case are addressed below.

1. Disparate Treatment-Prima Facie Case

In an attempt to establish a prima facie showing that Hispanic employees were not disciplined as severely for similar infractions of work rules as he was, Anderson's summary judgment evidence consists of the disciplinary history of two Hispanic DART transit police officers, Julio Sanchez ("Sanchez") and Thomas Montoya ("Montoya"). Pl.'s Resp. To Def.'s Mot. For Summ. J. Ex. I, Rodriguez Depo. At 305-06. To establish a prima facie case in this manner, Anderson must show that Hispanic employees were treated differently under circumstances "nearly identical" to his. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995); *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990).

In this regard, Anderson has offered evidence that Hispanic employees have been involved in infraction of DART's policies and rules and yet have not been terminated. However, Anderson's own summary judgment evidence demonstrates the material differences between Sanchez' and Montoya's infractions and his own. Sanchez' infractions concerned his use of unnecessary force while on-duty as a DART transit officer. Pl.'s Resp. To Def.'s Mot. For Summ. J. Ex. I.

Montoya's infractions stemmed from an off-duty bar fight which resulted in Montoya being charged with a Class C misdemeanor. Def.'s Mot. For Summ. J. App. 179-183. In contrast; Anderson's termination was based on his off-duty actions taken while holding himself out as acting in his official capacity as a DART transit officer. Additionally, his actions allegedly exceeded the scope of DART's jurisdictional boundaries. Def.'s Mot. For Summ. J. App. 73-77. Although both Sanchez and Montoya's conduct was serious, neither one allegedly compromised DART's jurisdictional boundaries, nor purported to conduct DART business while off-duty. Accordingly, the discipline of Sanchez and Montoya is not competent summary judgment evidence that Hispanic employees in "nearly identical" circumstances have been treated differently, and thus, Anderson has failed to establish his prima facie case of disparate treatment.

2. No Violation of Work Rule-Prima Facie Case

Anderson may alternatively establish his prima facie case of discriminatory discharge by showing he did not violate the work-rule for which he was disciplined. *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980). To establish his prima facie case, Anderson offers summary judgment evidence in the form of the DART transit Police Procedures Manual, which states in § 5.2 that officers should be prepared to act whenever their services are required, whether they are on or off duty. Pl.'s Resp. To Def.'s Mot. For Summ. J. Tab #J at 43. Anderson's interpretation of this section as permitting DART transit officers to act on DART's behalf while off-duty is supported by summary judgment evidence of a second off-duty incident Anderson was involved in on March 21, 1997. During this incident, Anderson, while off-duty, identified himself as a DART transit police officer and broke up a fight between two intoxicated people. Pl.'s Resp. To Def.'s Mot. For Summ. J. Bateman Depo. 46-50. In response to this incident Anderson was neither disciplined nor investigated for his actions. Id. Finally, Anderson contends that the area in which the incident occurred on March 21, 1997 was actually within Dart's jurisdictional boundaries as DART bus lines run on the same stretch of Northwest Highway Anderson and the Jeep traveled. Pl.'s Resp. To Def.'s Mot. For Summ.

J. With this proof, Anderson has established a prima facie case that he sis not violate DART's work rule and DART must satisfy its burden of production.

DART responds to Anderson's prima facie case by insisting that there was no racial motivation in its decision to terminate Anderson; that the decision was based solely on its conclusion, following an investigation, that Anderson violated a work rule concerning DART's jurisdictional boundaries. Def.'s Mot. For Summ. J. App. 73-78. DART has therefore discharged its burden of production, and the burden shifts to Anderson to prove DART's proffered reason is merely a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 510, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1193).

Anderson first attempts to meet his burden of persuasion and prove DART's proffered nondiscriminatory reason is pretextual essentially by relying upon his disparate treatment summary judgment evidence. As this Court has discussed above, however, Anderson's evidence of disparate treatment has failed to show Hispanic officers were treated differently under the circumstances that are "nearly identical" to Anderson's, and thus, Anderson's evidence of disparate treatment fails to rebut DART's nondiscriminatory reason.

Anderson next attempts to meet his burden of persuasion and prove DART's proffered nondiscriminatory reason is a pretext for discrimination by asserting that he did not violate a work rule. However, since DART based its decision to terminate Anderson on an investigation by the Committee with regard to allegations that he violated DART policies, the issue is not the validity of these allegations but whether the Committee reasonably believed the allegations against Anderson and acted upon them in good faith. *Singh v. Shoney's,* 64 F.3d 217, 219 (5th Cir. 1995); *See also Waggoner v. City of Garland,* 987 F.2d 1160, 1165 (5th Cir. 1993). Anderson must at least raise a fact issue that the Committee did not actually believe the allegations but instead used it as a pretext for an otherwise discriminatory dismissal. *Waggoner,* 987 F.2d at 1165. DART contends that Anderson cannot meet this burden of persuasion articulated by the Fifth Circuit in

Although there is some summary judgment evidence in the record which reflects on the motivations of Rodriguez, this evidence has no bearing on the motivation of the Committee.[6] Specifically, there is the deposition testimony of Sergeant Billy Bateman ("Bateman"), Anderson's immediate supervisor on March 21, 1997. Pl.'s Resp. To Def.'s Mot. For Summ. J. Bateman Depo. 72-74. In his deposition, Bateman stated that he had currently had an EEO claim of age discrimination pending against Rodriguez, and that Bateman felt Rodriguez was capable of discriminating against classes of federally protected people. Id. Anderson also offers the deposition of Snoble. In his deposition, Snoble stated that "diversity" was an area Rodriguez needed to work on in the past, and that "early on, there were charges that we only had primarily Hispanic officers." Pl.'s Resp. To Def.'s Mot. For Summ. J. Snoble Depo. 59. Although this summary judgment evidence may call into question Rodriguez' motives with respect to his decisions as Chief it bears not on the intentions of the Committee. Rodriguez, although present at the Committee's hearing, was not a member of the three person, racially diverse panel that investigated Anderson's conduct and therefore evidence of Rodriguez' possible racial bias does not call into question the Committees' motivation in making the decision to terminate Anderson. Anderson has therefore failed to show any genuine issue of material fact exists with respect to DART's proffered legitimate reasons for his termination, and this Court grants DART's motion for summary judgment on the issue of discrimination under Title VII.

B. Title VII Retaliation

DART moves for summary judgment on Anderson's claim of retaliation. DART contends that its summary judgment evidence on the

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[6] In his Response, Anderson does not present the following summary judgment evidence in the context of disproving a work rule violation. Instead, Anderson raises the following summary judgment evidence in a footnote during a discussion of custom and usage liability under 42 U.S.C. §1983. Pl.'s Resp. To Def.'s Mot. For Summ. J. fn. 105 at 45.

issue of retaliation establishes a prima facie case in its favor, which, based on Anderson's failure to respond, entitles DART tp judgment as a matter of law.

To make a prima facie case for reprisal discrimination, plaintiff must prove that (1) he engaged in activity protected by Title VII; (2) he was the subject of an adverse employment action; and (3) there exists a causal link between his protected activity and the adverse action. *Barrow v. New Orleans S.S. Ass'n.*, 10 F.3d 292. 298 (5th Cir. 1994); *Collins v. Baptist Mem'l Geriatric Ctr.*, 937 F.2d 190, 193 (5th Cir. 1991), cert. Denied, 112 S.Ct. 968, 117 L.Ed.2d 133 (1991). If the employee can prove a prima facie case of reprisal, the burden of proof shifts to the employer to articulate a legitimate, non-discriminatory reason for plaintiff's discharge. *Id.*

This Court notes that Anderson has failed to respond to DART's summary judgment claim for retaliation under Title VII. Rule 56(e) permits a proper summary judgment motion to be opposed bu the non-movant by many kinds of evidentiary materials listed in the rule. Fed. R. Civ. P. 56(e). If the adverse party does not so respond, the court may grant summary judgment is the movant has made a prima facie showing that it is entitled to such relief. *Eversly v. Mbank*, 843 F.2d 172, 174 (5th Cir. 1988); Fed. R. Civ. P. 56(e). A court may not grant a default summary judgment simply because the non-movant has failed to respond. *Eversly*, 843 F.2d at 174; *Tutton v. Garland Indep. School Dist.*, 733 F.Supp. 1113, 1117 (N.D.Tex. 1990). The court may, however, accept the movant's evidence as undisputed evidence. *Vega v. Parsley*, 700 F.Supp. 879, 881 (W.D.Tex. 1988).

Based on Anderson's failure to respond to DART's motion for summary judgment on Anderson's claim of retaliation under Title VII, this court accepts as undisputed DART's advancement of legitimate , non-discriminatory reasons for Anderson's termination. Specifically, DART offers as summary judgment evidence the Recommendations and Findings (the "Findings") of the Committee. Def.'s Mot. For Summ. J. App.73-77. In its report, the Committee found Anderson violated DART's authority both with respect to subject matter jurisdiction and

jurisdictional property boundaries. Id. DART also offers the deposition of Snoble. Def.'s Mot. For Summ. J. App. 87-90. In his deposition, Snoble states that he reviewed the Findings and documents relied on by the Committee in arriving at its conclusion, and decided not to reinstate Anderson based on his belief that Anderson did, in fact, violate DART's work rules. Id.

In the absence of any evidence from Anderson showing DART's explanation to be a "pretext" and in the absence of any evidence showing "but for" causation, this court grants DART's motion for summary judgment claim of retaliation under Title VII. *See Bodenheimer v. PPG Indus.*, 5 F.3d 955, 957 (5th Cir. 1993).

C. Sections 1981, 1983, 1985

1. Sections 1983 and 1985

Anderson claims that his termination violated his Fourteenth Amendment rights. In Anderson's original complaint, he alleges a conspiracy existed at DART to violate his 14th Amendment Equal Protection rights. In his response to DART's motion for summary judgment, Anderson also alleges a claim of conspiracy and violation of his 14th Amendment right to Procedural Due Process.

In order to state a claim under § 1983, Anderson must show that (1) a person, (2) acting under color of state law, (3) deprived him of a right secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.

In order to state a claim under § 1985, Anderson must show that: (1) a conspiracy involving two or more persons which is (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy which (4) causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994).

Anderson's claims that his termination was in violation of §§ 1983 and 1985 as a matter of law. DART is a political subdivision of the state of Texas, created by the Texas Legislature; and is a public entity. *Davis v. Mathis,* 846 S.W.2d 84, 87 (Tex. App.-Dallas 1992, no writ); Tex. Transp. Code Ann. § 452.052 (Pamphlet 1998). States and their political subdivisions such as DART are not "persons" within the meaning of 42 U.S.C. §1983 or §1985. *Morse v. Republican Party of Va.,* 517 U.S. 186, 221 n.34 (1996); *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65-66 (1989); *Tolbert v. Vasquez,* No. 3:93-CV-1468-X, slip op. At 12 (N.D. Tex. Mar. 27, 1998). Therefore DART cannot be liable for claims under §§ 1983 or 1985.

Additionally, this court notes that even if DART was found to be a "person" within the meaning of 42 U.S.C. §§ 1983 and 1985, the Eleventh Amendment to the united States Constitution operates to bar a suit against DART under § 1983 or § 1985. The Eleventh Amendment "bars suits in federal court by citizens of a state against their own state or a state agency or department." *Richardson v. Southern Univ.,* 118 F.3d 450, 452 (5th Cir. 1997), *cert. denied,* 118 S.Ct. 858 (1998); *Baldwin v. Univ. TX,* 945 F.Supp. 1022, 1030 (S.D. Tex. 1996) (State of Texas has not waived Eleventh Amendment immunity with regard to § 1983 suits). DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh Amendment. *Davis,* 846 S.W.2d at 87; *Tolbert* at 12; Tex. Transp. Code Ann. §452.052 (Pamphlet 1998).

Finally, this Court notes that had it not granted summary judgment on DART's § 1985 claim, since it has granted DART's summary judgment claim of retaliation under Title VII, it must dismiss Anderson's claim of conspiracy under § 1985. Since this Court has found no deprivation of Anderson's constitutional rights, no basis exists for assigning liability for a conspiracy. The Fifth Circuit has stated that "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient." *Villanueva v. McInnis,* 723 F.2d 414, 418 (5th Cir. 1984).

2. Section 1981

Anderson alleges that DART's discriminatory discharge violated § 1981. He argues that the wrongful termination of his employment contract with DART impaired his right to make, perform, modify and terminate contracts free of impairment under color of state law. Pl.'s Original Compl.

Section 1981 does not create a new substantive right or cause of action. Instead, it merely provides an additional remedy for "unlawful intentional discrimination...prohibited...under...42 U.S.C. § 2000e-2 or 2000e-3." 42 U.S.C. § 1981a(1)(1). The same legal analysis applies to race discrimination cases under both Title VII and § 1981. *Whitting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980). The same evidentiary framework governing claims of employment discrimination under Title VII govern claims of racial discrimination brought under § 1981. *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996) (*citing Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989)).

This Court does not reach the issue of whether Anderson has met his evidentiary burdens under §1981, however. As Anderson may not bring an action under § 1983, his claim under § 1981 must fail. The Supreme Court in *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 733-36, 109 S.Ct. 2702, 105 L.Ed2d 598, 625-27 (1989), held that § 1983 provides the "exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor," Id. At 735. Since this Court has determined DART cannot be sued under § 1983 both because it is not a "person" within the meaning of 42 U.S.C. § 1983 and because the Eleventh Amendment prohibits a suit against it, Anderson's claim under § 1981 must fail. Therefore, this Court grants DART's motion for summary judgment on the § 1981 claim.

D. Defamation and Exemplary Damages Claims

This Court notes that plaintiff Anderson has failed to respond to several claims in DART's motion for summary judgment. Specifically, Anderson failed to respond to DART's summary judgment claims on

defamation and exemplary damages. As mentioned previously, if the adverse party does not respond, the court may grant summary judgment if the movant has made a prima facie showing that it is entitled to such relief. *Eversly v. Mbank,* 843 F.2d 172, 174 (5th Cir. 1988); Fed. R. civ. P. 56(e). The court may also accept the movant's evidence as undisputed. *United States v. $252,671.48 in U.S. Currency,* 734 F.Supp. 254, 256 (N.D. Tex. 1990); *Tutton,* 733 F.Supp. At 1117.

Based on Anderson's failure to respond to DART's motion for summary judgment on Anderson's claim of defamation, this Court accepts as undisputed DART's summary judgment evidence of its intergovernmental immunity from liability for intentional torts under the Texas Tort Claims Act (the "Act"). *Tolbert* at 11; Tex. Civ. Prac. & Rem. Code Ann. § 101.021 *et seq* (Vernon 1997 & Supp. 1998). As a political subdivision of the state of Texas, any limited waiver of sovereign immunity under the Act does not apply where the claim arises out of an intentional tort, such as defamation. *Gillium v. City of Kerrville,* 3 F.3d 117, 123 (5th Cir. 1993); Tex. Civ. Prac. & Rem. Code Ann. §101.021 *et seq* (Vernon 1997 & Supp. 1998). This evidence constitutes a prima facie showing of immunity, and this court therefore grants DART's motion for summary judgment on the claim of defamation.

Finally, based on Anderson's failure to respond to DART's motion for summary judgment on Anderson's claim of exemplary damages, this Court accepts as undisputed DART's summary judgment evidence that DART, as a governmental unit of the state of Texas, is not subject to punitive or exemplary damages. Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021 *et seq*, 101.024 (Vernon 1997 & Supp. 1998). This evidence constitutes a prima facie showing of DART's immunity from liability for exemplary damages, and this Court therefore grants DART's motion for summary judgment on the claim for exemplary damages.

IV. Conclusion

For the foregoing reasons, it is ORDERED that defendant's

Motion for Summary Judgment filed July 22, 1998 be GRANTED.

SO ORDERED,

September 29, 1998.

/s/ Jane J. Boyle
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certified that three true and correct copies of the foregoing Brief have been delivered to:

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by certified mail, return receipt requested, on this 7th day of ~~September~~ October, 1999.

Bobbie J. Anderson